No. 22,302

IN THE

United States Court of Appeals
For the Ninth Circuit

LOIS COCHRAN,
Appellant,

vs.

MARIO DELIZIO,
Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT ANY NEGLIGENCE OF PLAINTIFF'S HUSBAND AS DRIVER OF THE CAR WAS IMPUTABLE TO PLAINTIFF.

Appellee erroneously states, without citation of authority, that the statute involved herein "is not a judicial (sic. legislative) expression" of a rule of law known as the "Family Purpose Doctrine". Appellant submits that the statute in question clearly is the embodiment of a typical "family purpose" rule, as is indicated by the very title itself: "Liability of motor vehicle owner for negligent operation by immediate member of family." The obvious and sole intent of the statute was to provide an injured plaintiff with a financially responsible defendant, and not to defeat the right of recovery of an innocent plaintiff.

It is clear, not only from the language of the statute itself, but from the legislative intent, that the statute was enacted solely for the purposes of *imposing liability*. Statutes of Nevada 1956-1957 describe the bill in question as follows:

> "AN ACT to amend Chapter 41 of NRS relating to special actions and proceedings by creating new provisions *imposing liability* upon the owner of a motor vehicle for negligent operation thereof by immediate member of family." (emphasis added)

Appellee states on page 18 of his Answering Brief that the Nevada Legislature must be deemed to have been aware of the California statute when it enacted NRS 41.440. This argument is absurd and self-defeating because if the Nevada Legislature had wished to enact such a statute it merely would have adopted it verbatim. A comparison of the two statutes shows that they are entirely different and obviously enacted for manifestly different purposes and reasons. The California "permissive use" statute applies to *any* permissive user while the Nevada statute is specifically limited to *immediate members of the family*. For these reasons alone, the California decisions cited on pages 11 and 12 of Appellee's Answering Brief are totally inapplicable.

Appellee also argues, equally illogically, that the Nevada Legislature should be deemed to have been aware of the California decisions construing the California statute. However, it is more natural that the Nevada Legislature was aware of the Nevada Supreme Court decision of *F. & W. Construction Co. v. Boyd*, 60 Nev. 117, 102 P. 2d 627 (1940), cited at pages 25 and 26 of Appellant's Opening Brief, holding that contributory negligence of a husband cannot be imputed to a wife in Nevada.

The overwhelming majority of the jurisdictions which have considered the problem have *rejected* the imputation of contributory negligence based solely on the owner-per-

mittee relationship, and the doctrine has been severely criticized by virtually all leading commentators. See 17 *Stanford Law Review* 55 (1964).

Appellant respectfully submits that NRS 41.440 is totally different, both in language and intent, from the California statute, and to impose the strained construction of *Milgate v. Wraith*, 19 Cal.2d 297, 121 P. 2d 10 (1942), decided 26 years ago, upon citizens of the State of Nevada, would be completely unwarranted and a gross miscarriage of justice.

It is noteworthy that Appellee concedes this instruction affected a substantial right of Appellant. The instruction was erroneous and thus dictates reversal of the judgment and retrial.

I. THE COURT'S INSTRUCTIONS ON THE DEFINITION AND SUBJECT OF CONTRIBUTORY NEGLIGENCE, ESPECIALLY WITH REFERENCE TO "SOME DEGREE" OF CONTRIBUTORY NEGLIGENCE WERE PREJUDICIAL ERROR.

A. Appellant's Exceptions and Objections to the Court's Instructions Were Legally Sufficient and In Compliance With FRCP 51; the Instructions Were Prejudicially Erroneous and Violated Appellant's Substantial Rights Within the Meaning and Provisions of FRCP 61.

Initially it should be noted that Appellee apparently concedes the various instructions to be erroneous, and relies upon a purely formalistic and hyper-technical construction of FRCP 51 and 61 in a vain attempt to rationalize the prejudicially erroneous instructions. The vast majority of his Brief is devoted to these rules, and Appellant respectfully submits that such a slanted and overemphasized effort to utilize their provisions demonstrates Appellee's total inability to distinguish the applicability and validity of Appellant's case authorities which dictate

a reversal of the judgment and remand of this case for retrial.

In view of Appellee's almost total reliance upon Rules 51 and 61, Appellant should like to respectfully point out that Circuit Court of Appeal decisions for years have declared that FRCP 51 was never intended to stultify form over substance, that it is not important in what *form* the objection is made or even that formal objection be made at all, so long as counsel states for the record objection to the particular instruction in such a manner that the trial judge is aware it is being challenged and is informed of possible errors so that he is given the opportunity of determining whether it should be corrected.

The following authorities pertaining to Rule 51 clearly demonstrate that Appellant fully and completely complied with FRCP 51.

In *Greyhound Corporation v. Blakley,* 262 F.2d 401, 408 (9 Cir. 1958) the Court declared:

> "The defendant's exception drew the trial court's attention to the contention that the instruction as to res ipsa loqutur should not be given . . . We believe that there was a sufficient compliance with Rule 51. Broderick v. Harvey, 1 Cir., 1968, 252 F.2d 274; Thomas v. Union Railway Co., 6 Cir. 1954, 216 F.2d 18."

In *Di Bari v. Fish Transport Co., Inc.,* 275 F.2d 280, 281 (2 Cir. 1960) a verdict for defendants was reversed over Appellee's contention that plaintiff had failed to comply with Rule 51. The Court held:

> "At the conclusion of the charge, plaintiff's counsel took exception 'to that portion of your Honor's charge wherein you stated that if the jury found the plaintiff Di Bari guilty of contributory negligence that the other plaintiffs could not recover.' The court overruled the exception and gave no further charge.

> We think this exception was sufficiently explicit to comply with Rule 51, Federal Rules of Civil Procedure, 28 U.S.C.A."

Moreau v. Pennsylvania R. Co., 166 F.2d 543, 545 (3 Cir. 1948) is very similar factually to the present case. Plaintiff excepted to an instruction, after which a brief discussion ensued, but the error was not corrected and plaintiff did not object. The court held that plaintiff properly preserved the error, and that "he is not required to indulge in reiterative insistence in order to preserve his client's rights."

In *Green v. Reading Co.,* 183 F. 2d 716, 719 (3 Cir. 1950) appellant made no objection whatsoever to the erroneous instruction, and all he did was submit an erroneous instruction himself on the issue in question. Despite the fact that no objection was made to the instruction given, and that appellant's requested and refused instruction was itself erroneous, the court held the requested instruction was "sufficiently specific to direct the attention of the court below to the issue and to the law, that it was adequate to indicate the error of the charge, . . . that the issue here involved was fairly and timely within the cognizance of the trial court, and that the substantive spirit of Rule 51 is satisfied."

In *Pierro v. Carnegie-Illinois Steel Corp.,* 186 F.2d 75 (3 Cir. 1950) the court held that although plaintiff's request to charge was erroneous, it was, together with the exceptions, *unmistakable in its direction and was sufficient to apprise the court of the issue he sought to raise.*

Appellee, in the first paragraph on page 24 of his Answering Brief, cites five cases, *all of which support our position and are favorable to Appellant. Sweeny v. United Features Syndicate, Inc.,* 129 F.2d 904 (2 Cir. 1942) holds, although plaintiff took no formal exception

to the court's refusal to give an instruction, that Rule 51 did not preclude the appellate court's consideration of the assigned error, where it appeared there was a discussion of the point raised which adequately informed the trial court as to what plaintiff contended was the law, and entry of a formal exception thereafter would have been a mere technicality. Likewise, *Evansville Container Corp. v. McDonald,* 132 F.2d 80 (6 Cir. 1942), after reciting the general rule, held that the objections *were sufficient* and in compliance with FRCP 51.

In *Williams v. Powers,* 135 F.2d 153, 155, 156 (6 Cir. 1943), the *sole objection by Appellant's counsel was: "I desire an exception, however, to Section 12603 of the General Code."* After discussing Rule 51, the court held: "In our opinion we should consider the objection of appellant to the instruction given."

Alcaro v. Jean Jordeau, Inc., 138 F.2d 767, 771 (3 Cir. 1943), was a case in which *counsel for appellant had merely asked the trial court for an exception to the portion of the charge regarding contributory negligence, which objection was held to be sufficient.* The court declared:

> "There is no good reason for applying the rule (Rule 51) so indiscriminately as to prevent counsel from pointing out on appeal matter which he did endeavor to identify to the trial court and which he had reason to believe the court fully apprehended when granting an exception."

Finally, in *Swiderski v. Moodenbaugh,* 143 F.2d 212 (9 Cir. 1944), appellant *orally* submitted an instruction, whereas Rule 51 requires written requests. Yet the Ninth Circuit held that plaintiff was not precluded from assigning and urging error thereon on appeal.

Appellee cites six additional cases in his Answering Brief, none of which is in point. In *Jack v. Craighead*

Rice Milling Co., 167 F.2d 96 (8 Cir. 1948) cert. den. 334 U.S. 829, 68 S.Ct. 1340, 92 L. Ed. 1756 (1948) the only record made by defendants was: "Both defendants except to the giving of said instruction." *Hanson v. St. Joseph Fuel Oil and Manufacturing Co.*, 181 F.2d 880 (8 Cir. 1950) states the general rules with respect to Rule 51, then points out that appellant made no objection whatsoever to the instructions with respect to the assigned error, and merely excepted to the refusal to give certain instructions, without any reasons given therefor whatsoever. *Fritz v. Pennsylvania R. Co.*, 185 F.2d 31 (7 Cir. 1950), involved a defendant who failed to specifically object to the instruction which he later challenged on appeal. It is of no assistance in the present case. In *Hoag v. City of Detroit*, 185 F.2d 764, 766 (6 Cir. 1950), appellant raised certain points with respect to the burden of proof, but the court simply observed: "No requests to *charge* on these points were addressed to the trial court". (emphasis added) Likewise, in *Garland v. Lane-Wells Co.*, 185 F.2d 857 (5 Cir. 1951), there was no objection *whatsoever* at the time of trial. Finally, in *Biggans v. Hajoca Corp.*, 185 F.2d 982 (3 Cir. 1950), appellant apparently merely made a general exception to a portion of an instruction and stated no grounds therefor. None of the above cases is of any assistance to Appellee in this respect.

The record clearly establishes that Appellant's counsel specifically objected to the instructions in question, stated the grounds of objection, and called to the attention of the trial court the precise issues of law involved. The trial court was made fully aware of plaintiff's vehemently expressed objections. The above authorities, applicable to specifications of Errors II, III, IV and V, vividly demonstrate that Appellant has fully complied with the requirements of Rule 51 and she necessarily is entitled to have all of the legal issues presented to the trial court and raised on this appeal decided on the merits by this Court.

Any other result would represent an emasculation of the purposes and meaning of F.R.C.P. 51.

B. The Definition of Contributory Negligence is Erroneous as a Matter of Law and is Contrary to the Law of the State of Nevada.

The colloquy between Court and counsel set forth on pages 21 and 22 of Appellee's Answering Brief makes it demonstrably clear that, after the trial court inquired of Appellant's counsel as to his position with respect to the *remaining* part of Instruction No. 73.21, objection was being made to *any and all parts of the instruction* where the word "some" appeared. It is preposterous to conclude that Appellee could obviate this precise exception and objection to such a critical definition of contributory negligence under any intelligent reading of the provisions of F.R.C.P. 51.

Appellee fails to cite a single case concerning the merits of the issue and cannot distinguish the sound authorities cited by Appellant. It is respectfully submitted the instruction was erroneous and the giving thereof was prejudicial error.

C. The Contributory Negligence Instruction Containing the Phrase "Some Degree" was Prejudicially Erroneous.

The record on this appeal and the detailed objections contained in Appellant's Specification of Errors in her Opening Brief demonstrates the trial court was fully apprised of the nature of the prejudicial errors urged by Appellant in the contributory negligence instruction.

Again it should be noted Appellee is totally unable to distinguish any of the authorities cited by Appellant in her Opening Brief sustaining the prejudicial effect of the instruction. Appellee cites but four cases to justify the giving of this patently erroneous instruction, none of which is in point. The instruction involved in *Freeman*

v. Churchill, 30 Cal.2d 453, 183 P.2d 4 (1947), was concerned with cautioning the jury not to *compare* the negligence of plaintiff and defendant and was obviously different from the instruction given in the instant case. In *Polk v. Los Angeles*, 26 Cal.2d 519, 159 P.2d 931 (1945), the instruction differed markedly from the one given in the present case and is not in point. *Warren v. P.I.E. Co.*, 183 C.A.2d 155, 6 Cal. Rptr. 824 (1960) is not applicable because the erroneous portion of the instruction was never attacked or even referred to by Appellant. Thus, the trial and appellate courts were not required to, and did not, discuss the particular prejudicial error arising in that instruction. Finally, *Koch v. Denver*, 24 Colo. App. 406, 133 Pac. 1119 (1913), is totally distinguishable factually from the present case and the instruction involved therein is completely different. Further, the opinion is primarily concerned with a discussion of the doctrine of comparative negligence and is not in point.

D. The Reference in Defendant's Argument to "One Percent of the Proximate Causes" on the Part of Mr. Cochran Was Prejudicial Misconduct and Reversible Error.

A casual reading of counsel for Appellee's argument to the jury reveals the grossly prejudicial impact it must have had upon the jury. The record shows Appellant's objections to Appellee's argument was not, as claimed in the Answering Brief, limited to omission of the word "proximate". It was aimed directly at the "time-honored" defense argument and use of the circle and the "one percent" argument, including the use of the words contributory negligence, in "some" degree, "however slight."

The objection clearly was sufficient. See *Kentucky Trust Company v. Glenn*, 217 F.2d 462 (6 Cir. 1954), where the court held that the error urged on appeal was preserved by appellant, who called the trial court's attention to the

error during the *final argument* in such a manner as to advise the court of the question of law involved. Manifestly, Appellant's counsel in the principal case could not be expected to stand before the jury and complain in a detailed manner with great delineation as to all of the prejudicial effects that such jury argument had upon Plaintiff's case. Such a required procedure would defy common sense, as well as sound judicial procedure.

It must be reiterated that Appellee has cited no legal authority whatsoever in response to the cases supporting Appellant's objections and exceptions, and makes no attempt to distinguish the cases cited by Appellant.

Finally, on page 27 and 28 of his Brief, Appellee states the errors were "harmless". He ignores the numerous cases cited by Appellant holding such errors were prejudicial, requiring a reversal of this judgment and remand for new trial. The instructions pertaining to contributory negligence and the use thereof by Appellee in closing argument demonstrates beyond any doubt their patent unfairness and prejudiciality to plaintiff. Her "substantial rights" definitely were affected.

III. THE TRIAL COURT'S INSTRUCTIONS ON CONTRIBUTORY NEGLIGENCE OF PLAINTIFF AND THE IMPUTATION OF HER HUSBAND'S ALLEGED NEGLIGENCE AS DRIVER OF THE CAR PREJUDICIALLY ACCENTUATED THE DUTY OF PLAINTIFF AND MINIMIZED THE DUTY OF DEFENDANT, WERE PREJUDICIALLY CUMULATIVE, UNBALANCED, REPETITIOUS AND GIVEN IN ERRONEOUS ORDER PRIOR TO INSTRUCTIONS ON DEFENDANT'S DUTIES OF CARE REFERABLE TO DEFENDANT'S CONDUCT AND HAD A PREJUDICIAL INFLUENCE AND IMPACT UPON THE JURY.

In answer to the unsupported statement of Appellee, the case of *Howard v. Cincinnati Sheet Metal & Roofing Co.,* 234 F.2d 233, 235, 237 (7 Cir. 1956) is directly in

point because, as in the present case, the repetitious instructions given in a simple negligence case leaned heavily in favor of the contentions of the Defendant. The Court stated: "Plaintiff asserts as error that in the voluminous and repetitious instructions undue prominence and emphasis were given to the defendant's theory. After carefully considering the lengthy instructions, we conclude that prejudicial error occurred, and the plaintiff is entitled to a new trial."

In the *Howard* case, as in the present case, the Defendant raised the issue of compliance with Rule 51. which was summarily disposed of by the Circuit Court, which held:

> "Defendant makes the point that plaintiff's counsel did not specifically object to all of the instructions which now appear to be repetitious, citing Rule 51, Federal Rules of Civil Procedure, 28 U.S.C.A. However, plaintiff's counsel did bring to the attention of the court his objection that numerous portions of the charge were repetitious. One objection which he urged, pointed out that Instruction 40 was 'repetitious of and fully covered by Instructions 39, 58, 59, 60, 61 and 66, as well as many other Instructions.' We hold it was unnecessary to break down the objection to the instructions into smaller segments or components in order to point out their repetitious nature. We think there was a sufficient compliance with Rule 51."

IV. A. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY ON THE PRESUMPTION OF DUE CARE OF A PARTY (THAT THE LAW HAS BEEN OBEYED) WHERE EVIDENCE AND TESTIMONY OF THAT PARTY WAS INTRODUCED AT THE TRIAL.

It is difficult to understand what respondent means when he claims at pp. 33-34 of the Answering Brief ". . . that the Court did not instruct the jury that a party is presumed to have exercised ordinary care or

'due care'." All of the cases in California cited in Appellant's Opening Brief, at pp. 47-52, hold that an instruction which states ". . . the law presumes . . . that the law has been obeyed" constitutes an instruction on the presumption of due care and obviously have direct application in this case.

A reading of the transcript at p. 414 would reflect that the so-called "only objection" claimed to have been made by Appellant's counsel to the cited erroneous instructions on presumptions set forth at p. 34 of Appellee's Answering Brief is totally misleading and incorrect, and would further show that the trial court was notified that the language "unless and until outweighed by evidence in the case to the contrary" was not the law in the State of Nevada, even if it was or had been in the State of California. In other words, Nevada never has adopted the doctrine that presumptions constitute continuing evidence which may be considered by the jury notwithstanding the introduction of testimony and evidence of the issue, as was held in *Smellie v. Southern Pacific Co.,* 212 Cal. 540, 299 Pac. 529 (1931). Thus, Appellee's counsel misconstrues the meaning of Appellant's objections that the State of Nevada does not have the same laws as the State of California, in citing Nevada Revised Statutes 52.070. The fact that Nevada has the same statute in nowise justifies the giving of an instruction that there is a presumption that the law has been obeyed, when offered by a party defendant who has personally testified concerning his conduct and introduced evidence on the manner of his operation of the automobile. All of the California cases cited by Appellant in her Opening Brief demonstrate the fallaciousness of this reasoning.

Appellee's argument that these California cases are not applicable in the instant case because the instruction actually given by the Court would benefit Plaintiff to a greater extent than it would benefit Defendant is equally

absurd. Obviously the same contention was subject to being made in all of those California cases cited and rejected by reason of the prejudicial and reversible error which was found to exist by reason of the giving of an instruction on the presumption of due care. The burden was upon Plaintiff to prove negligence on the part of Defendant Mario Delizio, and Plaintiff was entitled to establish that negligence without the additional burden of having to meet and "overcome and outweigh" a "presumption" that the law had been obeyed by Defendant Delizio.

Appellee's citation of *Solen v. V. & T. R. R. Co.,* 13 Nev. 106 (1878) is of no assistance to him. In the first place, no reference was made in the particular instruction involved in the *Solen* case to any *presumptions.* Secondly, the jury was instructed that "The known and ordinary disposition of men to guard themselves against danger" was only to be considered by it *together with the other facts of the case.* Nothing was contained in the instruction which told the jury, as was done in the principal case, that a *presumption* exists on that subject so long as "it is not *overcome or outweighed* by evidence in the case to the contrary, and none of the compelling and peremptory language requiring the jury to be bound to find in accordance with the presumption was contained in the instruction considered by the Nevada Supreme Court in the *Solen* case. Thus, the prejudicial effect of the presumption "that the law has been obeyed" in the principal case was in nowise involved in the *Solen* decision, wherein the jury was merely given the opportunity to consider the known and ordinary disposition of men along with all the other facts in the case. As pointed out by the Supreme Court of Nevada, that was only one of the tests by which the Plaintiff's proven conduct was to be measured, rather than being given any special class as a "presumption" which "continued to exist" "unless and

until outweighed by evidence in the case to the contrary" which was reiterated on two separate occasions in the particular instruction excerpted and objected to by Appellant herein.

It is also interesting to note Appellee failed to include the last paragraph of the Supreme Court of Nevada's opinion in discussing the instruction involved in the *Solen* decision: "The portion of the instruction complained of does not, in our opinion, authorize the jury to *presume anything in favor of the plaintiff,* in opposition to the facts established by his testimony." (emphasis added) Thus, it is apparent that the instruction was totally different from that given by the trial court in the instant case.

Not only did Appellant's counsel specifically quote the instruction and point out to the trial court that the evidence had dispelled and eliminated any such presumptions in this particular case, and specifically stated "We think for the jury to be given that instruction is improper;" the transcript at p. 414 shows that the Court specifically considered the matter, and the statement made by Appellee that "There was no way in which the court could have anticipated this objection or could have corrected the error, if any. F.R.C.P. 51" This quote wholly ignores what is contained in the record. The following appears at pp. 414-415 of the transcript, following the exception and objection made to the instruction by Appellant's counsel:

> "The Court: You mean those presumptions did not exist?
>
> Mr. Richard Wait: Not in this case.
>
> The Court: I am afraid they do exist, counsel."

Shanahan v. Southern Pacific Co., 188 F.2d 564 (9th Cir. 1951), cited by Appellee for the proposition that an instruction on the presumption of due care has no preju-

dicial effect and did not operate to deny Appellant any substantial right under F.R.C.P. 61, is typical of this continued effort to utilize these two rules (F.R.C.P. 51 and 61) when Appellee has no substantial basis for distinguishing the merits and validity of the cases cited on behalf of Appellant for reversing the judgment. Unlike the instant case where testimony as to conduct was given, the *Shanahan* case involved an action for wrongful death of decedent, whose testimony concerning his conduct was unavailable to the Plaintiff widow, and therefore, she obviously was entitled to the presumption of due care in the court's instructions. The only issue raised by plaintiff-appellant in that case was whether the trial court erred in the language used with respect to the continuing effect of the presumption of due care once evidence to the contrary on the issue had been introduced, and whether the federal district court had failed to instruct the jury that the presumption that continuing effect was to be weighed by the jury under the doctrine of *Smellie v. Southern Pacific Co.,* supra, as the law then existed in California before adoption of 29-b California Code No. Sec. 600 (a), providing that a presumption is not evidence. Thus, *Shanahan* has no applicability to the issues in this case in any manner whatsoever.

IV. B. THE TRIAL COURT PREJUDICIALLY ERRED IN INSTRUCTING THE JURY THAT THE PRESUMPTION OF DUE CARE (THAT THE LAW HAS BEEN OBEYED) WAS A CONTINUING PRESUMPTION TO BE CONSIDERED AS EVIDENCE WHICH MUST BE OUTWEIGHED AND OVERCOME BY OTHER TESTIMONY AND EVIDENCE AT THE TRIAL.

Appellee's conclusion from the language contained in Nevada Revised Statutes 52.070 that disputable presumptions "are satisfactory, if uncontradicted" and that disputable presumptions "may be controverted by other

evidence'' that such disputable presumptions are ''a form of evidence'' is obviously a *non sequitur*. It does not follow that merely because the legislature has declared that disputable presumptions may be controverted that they continue to exist as evidence under the doctrine of *Smellie v. Southern Pacific Co.,* supra. Indeed, the only reasonable construction of such language is that having been controverted by other evidence, such disputable presumptions, being ''disputable,'' thereby vanish.

Nothing contained in *Solen v. V. & T. R. R. Co.,* supra, 13 Nev. 106 (1878) justifies Appellee's statement that it ''held that the presumption of ordinary care is a form of evidence which would rebut the other direct evidence of Plaintiff's contributory negligence and prevent a nonsuit.'' In the first place, the court expressly declared that there was no presumption involved in the instruction which it was considering. Secondly, no reference whatsoever was made to the instruction involving ''a form of evidence'' with respect to ''the known and ordinary disposition of men'' and that language was not said to constitute matters which would rebut the other direct evidence, but rather could be used solely as a means of considering the direct evidence by the jury, and as a part of the test which it ordinarily would apply under standards of reasonable care and prudence.

The quotation by Appellee from 29 Am. Jur. 2d, Evidence, Sec. 135, at pp. 201-203, supports the position asserted by Appellant in its Opening Brief, reflecting that most courts take the view that such a presumption is not evidence, has no weight as such, and disappears completely from the case upon presentation of contravening evidence. Thus, Respondent has wholly failed to answer Appellant's case authorities and exceptions and objections to the instruction making the presumption of due care one which must be overcome and outweighed by evidence on the same issue to the contrary. As set forth in the

cases cited under Sections IV. A. and IV. B. of Appellent's Opening Brief, the court's instruction was prejudicial error and the judgment must be reversed for retrial under the voluminous authorities existing in California and in jurisdictions throughout the United States.

V. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT A VIOLATION OF THE RENO CITY ORDINANCE CREATED ONLY A PRESUMPTION OF NEGLIGENCE AS A MATTER OF LAW WHICH MIGHT BE OVERCOME BY EVIDENCE OF THE EXISTENCE OF ORDINARY CARE.

Appellee again relies solely upon F.R.C.P. 51 and 61 in the hope that this court will be deluded into believing that the trial court had "no chance" to rectify the errors contained in these instructions. In this regard we respectfully refer the court to page 394 of the transcript, wherein Appellant's counsel not only informed the trial court there was no evidence under the circumstances which could constitute a rebuttal for a vanishing of the presumption of negligence arising in this case, it was also stated ". . . *and we think that the Instruction is erroneous.*" The Court immediately responded: "The exception is overruled." Thus, a direct attack and exception was made to the Instruction and the trial court was given the opportunity to inspect it further and consider it in the light of the objections made by Appellant. Instead, the Court did not see fit to do so, and without any further inquiry and without extending Appellant's counsel any further opportunity to delineate how and why the Instruction was erroneous, overruled the exception. Under these circumstances, and with the voluminous instructions offered and rejected or accepted over several hours of time, any construction of F.R.C.P. 51 which would hold the exceptions and objections to this instruction insufficient would constitute a manifest injustice.

With respect to the merits of the Court's Instruction, Appellee's contention that "the Instruction says no more than that a violation of law constitutes negligence as a matter of law in the absence of a *preponderance* of evidence that the driver exercised ordinary care under the circumstances," is patently absurd. No effort is made to distinguish the cases cited by Appellant from numerous jurisdictions which directly hold a reversal is required by reason of the giving of such an instruction. Appellee's attempt to convince this Court that no legal distinction exists between an unexcused violation of law and the introduction of evidence of ordinary care to rebut a presumption of negligence in minority jurisdictions such as California, constitutes the Sophist's approach and cannot rationalize the prejudicial error which arises by reason of the giving of such an instruction.

The Nevada Supreme Court decisions cited by Appellant in her Opening Brief are attempted to be distinguished by Appellee on the basis they "merely hold that under the circumstances of those cases it was not prejudicial error to instruct that a violation of the particular law in question was negligence *per se*." It is respectfully submitted by Appellant that if such a strained construction of state law is accepted by any circuit court applying the doctrine of *Erie R. Co. v. Tompkins,* then such state law is subject to total legal emasculation.

Appellee claims that the instruction was "of greater benefit to the plaintiff than any possible benefit which could have accrued to the Defendant." This so-called new legal principle which Appellee has conjured up as the basis for obviating the long established rules of law adopted and applied by the cases cited in Appellant's Opening Brief, can be of no assistance to Appellee in arguing that Plaintiff was the "potential beneficiary" of such an instruction on issues arising under affirmative defenses of contributory negligence pleaded by Defend-

ant where the error affects Plaintiff's burden of proof in establishing negligence on the part of Defendant automobile driver. The two issues are totally separate and distinct, and cannot be used by Appellee as a basis for "harmless error" under the frequently cited rule set forth in F.R.C.P. 61.

It is respectfully submitted that Appellee's attempt to equate Prosser's works as stating that the rules of law of the majority of jurisdictions and the minority of jurisdictions are essentially the same, in that each allows the finder of fact to avoid a conclusive finding of negligence, entirely fails to meet the substance and validity of the legal reasoning contained in all of the cases cited by Appellant in her Opening Brief at pages 60-64. These cases set forth a carefully defined legal distinction between an unexcused violation of law under the doctrine of negligence per se, and evidence of ordinary care which a very few minority jurisdictions permit to rebut a "presumption of negligence". The so-called "rebuttable presumption of negligence" rule does not exist under the law of the State of Nevada, by reason of *Ryan v. The Manhattan Big Four Mining Company,* 38 Nev. 92, 145 P. 907 (1914), and *Southern Pacific Company v. Watkins,* 83 Nev. 471, 435 P. 2d 498 (1967). In view of Nevada's negligence as a matter of law doctrine, the giving of this instruction necessarily constitutes reversible error.

VI. THERE WAS A TOTAL FAILURE BY DEFENDANT TO PLEAD THE AFFIRMATIVE DEFENSE OF PASSENGER CONTRIBUTORY NEGLIGENCE, AND THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE GIVING OF SAID INSTRUCTION.

Contributory negligence of Plaintiff was never in issue in the trial of this case and the giving of an instruction thereon was reversible error. Said issue was not raised

by Defendant in his Memorandum of Contentions of Fact and Law (Tr. of Rec. 61) and, more importantly, the Court's Pre-Trial Order (Tr. of Rec. 94) clearly eliminated it from the trial. The Pre-Trial Order and the Issues of Fact and Law listed therein make no mention whatsoever of contributory negligence on the part of Plaintiff. Further, the last paragraph provides:

> "The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, *this order shall supersede the pleadings and govern the course of the trial of this cause,* unless modified to prevent manifest injustice." (emphasis added)

The giving of an instruction pertaining to an affirmative defense not disclosed at the pre-trial conference constitutes prejudicial and reversible error. *Taylor v. Reo Motors, Inc.,* 275 F. 2d 699 (10 Cir. 1960). The parties are bound by the pre-trial order and they may not later inject an issue not raised at the pre-trial conference. *McCarthy v. Lerner Stores Corporation,* 9 F.R.D. 31 (D.C. 1949); *Washington v. General Motors Acceptance Corp.,* 19 F.R.D. 370 (1956). See also *Walker v. West Coast Fast Freight, Inc.,* 233 F. 2d 939 (9 Cir. 1956).

Appellant respectfuly submits there is a total absence of evidence of contributory negligence on the part of Plaintiff, and there most certainly is not *substantial evidence* thereof. Plaintiff was merely riding as a passenger in an automobile driven by her husband at a speed of 20 to 25 miles per hour, on a through street, and simply could not have been negligent under the circumstances involved herein. Where the trial court submits to the jury an issue concerning which there is no substantial evidence, the giving of such instruction is prejudicial error. *Leavitt v. De Young,* 263 P. 2d 592 (Wash. 1953). (citing numerous cases) There is a presumption that giving of an instruction not supported by substantial evidence is

prejudicial error. *Evansville Container Corporation v. McDonald,* 132 F. 2d 80 (6 Cir. 1942).

The instruction in question in effect imposed upon Plaintiff the affirmative duty to exercise some degree of control over the vehicle in which she was riding. Yet the law is clear that when one joint "owner" is at the driving wheel and the vehicle is in motion on a highway the other joint "owner" is *not* then in control of its operation *and is not in a position to assert control. Jenks v. Veeder Contracting Co.,* 177 Misc. 240, 30 N.Y.S. 2d 278 (1941).

Again, it should be noted that no cases are cited by Appellee with respect to this issue and no attempt has been made to distinguish the numerous authorities cited in Appellant's Opening Brief. The giving of the instruction on passenger contributory negligence clearly constitutes reversible error.

VII. THE COURT ERRED IN ADMITTING EVIDENCE OF A CLAIM MADE BY DEFENDANT'S PASSENGER ADA SCHAEFER AGAINST PLAINTIFF AND HER HUSBAND AND THAT THE CLAIM HAD BEEN CLOSED.

Appellee's "credibility" argument truly is incredible! The credibility or bias of this witness was never raised by Appellant in her deposition or at the trial prior to its introduction in evidence over Appellant's objections. The subject of the credibility of Ada Schaefer could not be invoked by Appellee by "negativing the present existence of a claim" under the guise of testimony offered by Appellee, aimed specifically at the question of *liability* and intentionally designed to imply an admission of liability on the part of Plaintiff.

The only case cited by Appellee, *Zelayeta v. Pacific Greyhound Lines,* 104 C.A. 2d 716, 232 P. 2d 572 (1951) obviously is not in point and warrants no discussion since

it involves an opposing party's attack upon a witness adverse to it, which Appellant made no effort to do in the instant case. The admission of such testimony was prejudicial to Appellant herein and reversible error.

CONCLUSION

Appellant submits that an objective appraisal and review of the record in this appeal clearly reveals the prejudicial and reversible errors which occurred in the trial of this case. As stated in *Mack v. Precast Industries, Inc.,* 369 Mich. 439, 120 N.W. 2d 225 (1963), cited in our Opening Brief, this Plaintiff was never given a chance. It is respectfully requested that the judgment herein be reversed and the cause remanded for a new trial.

Dated, Reno, Nevada,
January 23, 1969.

Respectfully submitted,

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